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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BILL HENDERSON,

Plaintiff and Appellant,

v.

DEXTER CARTER,

Defendant and Respondent.

B241994

(Los Angeles County
Super. Ct. No. BC323154)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rex Heeseman, Judge. Affirmed.

Akudinobi & Ikonte, Emmanuel C. Akudinobi and Chijioke O. Ikonte, for Plaintiff and Appellant.

Coleman & Associates, John M. Coleman and Eric R. Schaefer, for Defendant and Respondent.

I. INTRODUCTION

Plaintiff, Bill Henderson, appeals from a May 1, 2012 amended judgment on a special verdict. Plaintiff challenges the reduction of an attorney fees award following his favorable verdict in a case litigated pursuant to title 42 United States Code section 1983 (“section 1983”). Plaintiff was awarded attorney fees in the sum of \$109,977; the equivalent of 20 percent of his final submitted request of \$549,885. Plaintiff argues the trial court abused its discretion by reducing his attorney fees request. Defendant, Dexter Carter, argues the trial court did not abuse its discretion by reducing plaintiff’s attorney fees request. Defendant also contends the trial court abused its discretion by not further reducing or denying plaintiff’s attorney fees in their entirety. We affirm the amended judgment.

II. FACTUAL BACKGROUND

A. Jury Trials

Plaintiff initiated this litigation on October 18, 2004. On December 5, 2006, plaintiff filed a second amended complaint pursuant to section 1983. Plaintiff alleged he was the victim of excessive force by several Los Angeles County Sheriff’s deputies including defendant on January 10, 2004. Plaintiff sued defendant and Deputies Thomas Simpson and Pauline Panis as well as the County of Los Angeles. Plaintiff also sued four supervisors of the deputies. Plaintiff alleged seven causes of action related to the January 10, 2004 incident, including: excessive force; conspiracy to torture and maim; reckless indifference; conspiracy to interfere with civil rights; and racial profiling. On March 15, 2007, the trial court sustained a demurrer filed by seven codefendants. The matter was first tried in April 2008 against Deputies Simpson and Panis and defendant for the claim of excessive force. The trial resulted in a hung jury. The judge who presided over the first trial did not rule on the attorney fees motion which is the subject of this appeal. The

trial court directed a verdict in favor of Deputy Simpson. Plaintiff unsuccessfully appealed the directed verdict. (*Henderson v. County of Los Angeles* (Apr. 29, 2009, B209871) [nonpub. opn.])

On April 27, 2011, the retrial started against Deputy Panis and defendant. Plaintiff's evidence was as follows. On January 10, 2004, plaintiff and Mark Howell walked to a bar near where they worked. Plaintiff and Mr. Howell stayed until almost closing time. Plaintiff testified he had a few drinks. After the bar closed, plaintiff and Mr. Howell walked to the parking lot near their place of employment. Plaintiff and Mr. Howell then went by separate cars to pick up Yesenia Lopez. Ms. Lopez was plaintiff's girlfriend. Upon arriving at Ms. Lopez's house, plaintiff and Mr. Howell got into an argument in the middle of the street. Sheriff's deputies arrived and separated plaintiff and Mr. Howell. Plaintiff was ordered to put his hands behind his back and he responded they were. Plaintiff was placed face down on the ground. Plaintiff was kicked in the sides.

Ms. Lopez testified plaintiff turned around to look at a deputy. Part of plaintiff's elbow came in contact with the deputy. Plaintiff was thrown to the ground by a deputy. A male deputy hit plaintiff. Plaintiff was then handcuffed. Thereupon, the male deputy started kicking plaintiff. Later in the hospital, Ms. Lopez noticed one of plaintiff's eyes was completely shut. Part of his face was swollen and he had a neck brace.

Defendant testified as to the following. Defendant and Deputies Panis and Simpson responded to a disturbance call on January 10, 2004. The deputies approached Mr. Howell and plaintiff and separated them. While searching Mr. Howell, defendant saw plaintiff laying atop Deputy Simpson, both of them facing skyward. Defendant approached from a kneeling position to secure plaintiff's hands. According to defendant, plaintiff appeared to be making striking motions. Deputy Panis used her pepper spray on plaintiff. Deputy Panis and defendant had difficulty securing plaintiff's hands. After Deputy Panis used the pepper spray, defendant struck the right portion of plaintiff's face three times with a closed fist. Defendant also kneed plaintiff in the rib.

The jury returned a verdict in favor of plaintiff. The jury found Deputy Panis used excessive force on plaintiff. But the jury also found her conduct was not a substantial factor in causing plaintiff harm. The jury found that defendant used excessive force and this was a substantial factor in causing plaintiff harm. The jury awarded plaintiff \$17,940.80 as damages, consisting of: \$1,216.80 for loss of earnings; \$11,724.00 for medical expenses; and \$5,000 for non-economic loss.

B. Attorney Fees Motion

On August 25, 2011, plaintiff moved for a reasonable attorney fees award pursuant to title 42 United States Code section 1988 (“section 1988”). Plaintiff sought \$2,380,331.55. The case was litigated on plaintiff’s behalf by Emmanuel C. Akudinobi and Chijioke O. Ikonte. Plaintiff relied on Mr. Akudinobi’s declaration. Mr. Akudinobi and Mr. Ikonte spent 2,878.8 hours from the prosecution of this action in 2004 to the first trial in 2008. Mr. C. Chiki Amobi from another law office spent 475 hours assisting Mr. Akudinobi. Between May 2008 and the filing of the attorney fees motion, Mr. Akudinobi’s office spent 1,701 hours working on the case. Plaintiff’s attorneys billed at a rate of \$250 to \$450 per hour over the course of this litigation. This amounted to \$1,586,887.70 for 5,054.8 hours. Plaintiff contended his attorneys were entitled to a multiplier of 1.5 based on: the excellence of the results; undertaking the action on contingency; the highly contentious nature of the litigation; and the deterrent effect this litigation would have on excessive force by sheriff’s department employees. Multiplying \$1,586,887.70 by 1.5, plaintiff reached the amount of \$2,380,331.55. Defendant argued the attorney fees requested were unreasonable. Defendant asserted: prevailing parties are not entitled to attorney fees by right; plaintiff’s fee request was grossly disproportionate to the amount awarded; and plaintiff offered insufficient documentation, namely no time sheets or written evidence. Following the filing of defendant’s opposition, plaintiff reduced his hours by 379; the time spent on the unsuccessful appeal

of the directed verdict. The new requested amount was \$1,464,212.70 for 4,715.8 hours of work.

C. January 19, 2012 Hearing

On January 19, 2012, the attorney fees hearing was held. Prior to the August 26, 2011 hearing, the trial court had stated it would apply a “reality check” to the attorney fees, taking into account the verdict amount. At the January 19, 2012 hearing, the trial court: refused to award an enhancement based on the verdict amount; declined to permit more than one attorney to bill for the litigation as only one was sufficient; found plaintiff’s attorneys had not properly documented their work in this litigation; advised plaintiff that he would not be awarded an amount anywhere close to the initial fee request of over \$2 million; stated the amount of damages found by the jury was a critical factor for determining the attorney fees awarded; and granted plaintiff permission to submit a supplemental brief.

D. Supplemental Brief

On February 10, 2012, plaintiff submitted his supplemental brief in support of his attorney fees motion. Plaintiff’s counsel reduced the hours to 1,832.95 at a flat billing rate of \$300 per hour. Plaintiff requested attorney fees in the amount of \$549,885. Plaintiff removed from the calculation of hours the: time spent on unsuccessfully appealing the directed verdict for Mr. Simpson; time spent by Mr. Amobi and Mr. Ikonte; work done by more than one lawyer to avoid double billing; time spent on the phone; and meetings between the lawyers.

E. Attorney Fees Order

On February 28, 2012, the trial court issued an order granting plaintiff's attorney fees motion. The trial court noted plaintiff's initial request of \$2,380,331.55 was an unfathomable amount to award. The trial court accepted the figure of \$549,885 as reasonable. However, the trial court further reduced plaintiff's attorney fees award by 80 percent, from \$549,885 to \$109,977. The trial court noted plaintiff's award of damages did not meet the jurisdictional minimum for a general jurisdiction case. The trial court found plaintiff appeared to unreasonably complicate this action by: bringing suit against unnecessary defendants; aggressively pursuing discovery and requesting court intervention, resulting in the appointment of a discovery referee; and filing an unsuccessful appeal. The trial court found an excessive force case is not novel, inherently complex, or unusually difficult. The trial court declined to disregard plaintiff's unreasonably inflated first request and inadequate supporting documentation. The trial court found a diminution of award necessary to discourage unreasonable inflation of requested attorney fees. On May 1, 2012, the trial court issued the amended judgment, reflecting attorney fees and costs. Plaintiff subsequently appealed.

III. DISCUSSION

A. Failure To Provide An Adequate Record

The retrial occurred before the Honorable Rex Heeseman. Judge Heeseman ruled on the post-trial attorney fee motion. We asked the parties to brief the adequacy of the record as there was no reporter's transcript of the trial presided over by Judge Heeseman. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295; *In re Kathy P.* (1979) 25 Cal.3d 91, 102.) For clarity's sake, future references to Judge Heeseman's rulings are those of the trial court. We have judicially noticed the transcript of the trial presided over by Judge Heeseman that was lodged in case No. B235540. The record is adequate.

B. Overview of Merits

Section 1988(b) provides that in an action to enforce a provision of designated civil rights statutes, including section 1983, “[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs” The purpose of section 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 429 (*Hensley*); see *LeFemine v. Wildeman* (2012) 568 U.S. ___, ___ [133 S.Ct. 9, 11].) Section 1988 attorney fees may be awarded in section 1983 cases litigated in state courts. (*Board of Administration v. Wilson* (1997) 57 Cal.App.4th 967, 974; *Sinclair & Valentine Co. v. County of Los Angeles* (1988) 201 Cal.App.3d 1021, 1024, fn. 2.) We review the trial court’s award of section 1988 attorney fees for an abuse of discretion. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 989 (*Chavez*); *McCown v. City of Fontana* (9th Cir. 2009) 565 F.3d 1097, 1101.)

Plaintiff argues the trial court abused its discretion for the following reasons. According to plaintiff, the trial court: did not explain what rare or exceptional circumstances justified a reduction of the fee; reduced the fee based on the amount of the verdict; erred by considering that plaintiff did not prevail against all defendants; improperly noted plaintiff aggressively pursued discovery disputes, leading to the appointment of a discovery referee; erred by considering that plaintiff filed an unsuccessful appeal; should not have found the case to be simple; refused to rely upon defendant’s counsel’s billable hours as a comparison of reasonableness; and would not allow plaintiff to bill for more than one attorney’s work. We find plaintiff’s arguments unpersuasive.

C. The Calculation Of The Lodestar

The analysis for determining attorney fees is done by the lodestar method. (*City of Riverside v. Rivera* (1986) 477 U.S. 561, 568 (plur.opn. of Brennan, J.) (*Rivera*); *Blum v.*

Stenson (1984) 465 U.S. 886, 888 (*Blum*).) Under this method, the United States Supreme Court has held: “The initial estimate of a reasonable attorney’s fee is . . . calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. [Citation.]” (*Ibid.*, citing *Hensley, supra*, 461 U.S. at p. 434.) This figure is known as the lodestar. (*Rivera, supra*, 477 U.S. at p. 568; see *Donovan v. Poway Unified School Dist.* (2008) 167 Cal.App.4th 567, 628.)

D. Limiting Billable Hours To One Counsel

Plaintiff contends the trial court abused its discretion by permitting plaintiff to bill for only one attorney. The trial court found the excessive force case would not require more than one attorney. The United States Supreme Court has held trial courts should exclude from the initial fee calculation hours that were not “‘reasonably expended.’” (*Hensley, supra*, 461 U.S. at p. 434; see *Heritage Pacific Financial, LLC v. Monroy* (2013) 215 Cal.App.4th 972, 1004-1005.) In *Hensley*, the United States Supreme Court stated: “Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.” (*Hensley, supra*, 461 U.S. at p. 434; see *Quigley v. Winter* (8th Circ. 2010) 598 F.3d 938, 956-957.) The trial court did not abuse its discretion by concluding hours from more than one attorney would be excessive, redundant, or otherwise unnecessary.

E. Use Of Defendant’s Counsel’s Billed Hours To Prove Reasonableness Of Plaintiff’s Attorneys’ Billed Hours

Plaintiff argues the trial court erred by refusing to consider hours billed by defense counsel as evidence his attorneys’ initially billed hours were reasonable. Defendant’s counsel revealed their billed hours in two unsuccessful attorney fees motions.

Defendant's counsel expended 5,360.18 hours at the time of the attorney fees motion hearing. Plaintiff argues his attorneys should be credited with expending 4,715.8 hours.

The trial court found plaintiff's counsel did not keep sufficiently detailed records. The trial court acknowledged plaintiff's counsel had taken the case on a contingency basis. But the trial court found plaintiff's attorneys presented inadequate documentation. The United States Supreme Court held: "The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the [trial] court may reduce the award accordingly [¶] . . . [¶] The fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked . . . and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims." (*Hensley, supra*, 461 U.S. at pp. 433, 437; see *Meister v. Regents of University of California* (1998) 67 Cal.App.4th 437, 448, fn. 9.) Plaintiff had the burden of producing adequate documentation as the fee applicant. The trial court did not abuse its discretion by declining to consider defendant's billed hours to determine an acceptable lodestar.

F. The Trial Court's 80 Percent Reduction Of The Lodestar

1. Overview

Other considerations may reasonably lead a trial court to adjust the fees downward. While several factors were relevant, the United States Supreme Court held the result obtained is the most critical factor in deciding a reasonable fee amount. (*Hensley, supra*, 461 U.S. at pp. 436, 440; accord *Chavez, supra*, 47 Cal.4th at p. 989.) The United States Supreme Court has ruled: "If . . . a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where

the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.” (*Hensley, supra*, 461 U.S. at p. 436; see *Lash v. Hollis* (2008) 525 F.3d 636, 642; *Spencer v. Wal-Mart Stores, Inc.* (3rd Cir. 2006) 469 F.3d 311, 318.)

In *Chavez*, our Supreme Court held: “‘A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.’” (*Chavez, supra*, 47 Cal.4th at p. 990, quoting *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635 (*Serrano*).) Our Supreme Court has stated: “‘If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked in the first place. To discourage such greed, a severe[] reaction is needful. . . .’” (*Brown v. Stackler* (7th Cir. 1980) 612 F.2d 1057, 1059.)” (*Serrano, supra*, 32 Cal.3d at p. 635.)

2. Amount Recovered As Critical Factor For Reasonableness Of Fee Request

Plaintiff argues Congress in enacting section 1988 did not intend a rule of proportionality between the amount recovered and attorney fees awarded. Plaintiff relies on *Rivera, supra*, 477 U.S. at page 574 where the United States Supreme Court held: “The amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded under § 1988. See *Johnson [v. Georgia Highway Exp., Inc.* (5th Cir. 1974) 488 F.2d 714,] 718. It is, however, only one of many factors that a court should consider in calculating an award of attorney's fees. We reject the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff actually recovers.” The trial court acknowledged there was no rule requiring proportionality between the amount recovered and the requested attorney fee. However, as noted, the crucial factor in determining reasonable attorney's fees is the extent of plaintiff's success. (*Rivera, supra*, 477 U.S. at p. 574; *Hensley, supra*, 461 U.S. at p. 440.) The trial court determined plaintiff's final requested fees amount of \$549,885

was an acceptable lodestar. The trial court exercised its discretion by reducing the lodestar based on the most critical factor—the degree of success obtained. (*See Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359, 364 [trial court “was not only free but obligated to consider the ‘results obtained’ by [the prevailing party] or ‘the extent of [his] success’”]; *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417-418 [holding under *Hensley* trial court should only award fees that are reasonable in relation to results obtained, either by eliminating specific hours or reducing the award]; see *Environmental Protection Information Center v. Dept. of Forestry and Fire Protection* (2010) 190 Cal.App.4th 217, 239 [same].) The trial court did not abuse its discretion on this ground.

3. Special Circumstances For Reduction Of Lodestar

Plaintiff argues the trial court abused its discretion by reducing the lodestar without specifically explaining what rare or exceptional circumstances were present to justify the lower amount. Plaintiff contends rare or exceptional circumstances are necessary to overcome the strong presumption of reasonableness. Plaintiff cites to *Perdue v. Kenny A.* (2010) 559 U.S. ___, ___ [130 S.Ct. 1662, 1671-1672] (*Perdue*). In *Perdue*, the United States Supreme Court held a reasonable fee amount is one that is sufficient to induce a capable attorney to represent a plaintiff on a meritorious civil rights claim. (*Id.* at p. ___ [130 S.Ct. at p. 1672]; see *In re Pilgrim’s Pride Corp.* (5th Cir. 2012) 690 F.3d 650, 661.) But the fee calculation must not result in windfalls to successful attorneys. (*Fox v. Vice* (2011) 563 U.S. ___, ___ [131 S.Ct 2205, 2215-2216]; *Blum, supra*, 465 U.S. at p. 897.)

Plaintiff’s argument is unpersuasive. The trial court found plaintiff’s initial fee request of \$2,380,331.55 was unreasonably inflated. This is a special circumstance permitting the trial court to reduce the amount of the award. (*Chavez, supra*, 47 Cal.4th at p. 990; *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137.) Partial success may make the calculation of reasonable hours times a reasonable rate an excessive amount.

(*Hensley, supra*, 461 U.S. at p. 436; *Heritage Pacific Financial, LLC v. Monroy, supra*, 215 Cal.App.4th at p. 1005.) Plaintiff did not submit adequate documentation in support of his fee request, which favors a lodestar reduction. (*Hensley, supra*, 461 U.S. at p. 433; *Serrano, supra*, 32 Cal.3d at p. 635, fn. 21.) Having found an unreasonable inflation of fees and considering plaintiff's limited success, the trial court, in accordance with *Hensley, Chavez, and Serrano*, had discretion to reduce the lodestar.

4. Reliance On Other Factors To Reduce Lodestar

Plaintiff contends the trial court abused its discretion by reducing the lodestar based on additional factors: he did not prevail against all defendants; his aggressive pursuit of discovery and requests for court intervention led to the appointment of a discovery referee; he pursued an unsuccessful appeal; and an excessive force case is not novel, inherently complex, or unusually difficult. In its order, the trial court considered the above matters as factors in reducing the lodestar. Plaintiff's arguments have no merit. To the extent that the trial court referred to plaintiff's lack of success, it focused on the critical factor of the verdict amount. (*Hensley, supra*, 461 U.S. at p. 436; *In re Tobacco Cases I* (2013) 216 Cal.App.4th 570, 588.) Under *Chavez* and *Serrano*, the trial court had discretion to consider an unreasonably inflated fee request as a special circumstance to reduce or deny an award. (*Chavez, supra*, 47 Cal.4th at p. 990; *Serrano, supra*, 32 Cal.3d at p. 635.) The trial court did not abuse its discretion on these grounds.

G. Defendant's Argument For Further Reduction Of Plaintiff's Attorney Fees

Defendant argues the trial court abused its discretion by not further reducing or denying plaintiff's attorney fees in their entirety. Defendant contends when plaintiff submitted his initial motion and reply regarding attorney fees, each instance was an independent ground for outright denial of any fees. Defendant separately appealed the

amended judgment. On February 20, 2013, we denied a motion to consolidate both appeals. That appeal remains in the briefing stage.

IV. DISPOSITION

The May 1, 2012 amended judgment is affirmed. All parties are to bear their own costs and attorney fees on appeal.

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TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.